THE CIVIL AND POLITICAL STATUS OF INHABITANTS OF CEDED TERRITORIES.

EVERY human being living in an organized political community who has rights and duties is citizen, subject or foreigner. These rights and duties are reciprocal, and are of necessity regulated and controlled by usage and in accordance with the law and constitutional principles of the state. The law of civilized countries ascribes to each individual at his birth two distinct legal states or conditions, — one by virtue of which he becomes the subject (citizen) of some particular country, binding him by the tie of natural allegiance, and which may be called his political status; another, by virtue of which he has ascribed to him the character of subject (citizen) of some particular country, and, as such, is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status. The political status may depend on different laws in different countries, whereas the civil status is governed universally by one simple principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil status; for it is on this basis that the personal rights of a party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend.[1] Under the American political system citizens (nationals) are naturally and usually divided into two general classes: (1) all the inhabitants (people) resident in the territories and owing allegiance to the state, who are secured by the public, natural, or fundamental law, the enjoyment of civil, personal, and property rights; (2) a limited and privileged number, who, for reasons or motives of state policy and expediency, are clothed with political power, and exercise the elective franchise. But so far as "protective rights" are concerned, the first class is as fully protected by law as the second class.

On the threshold, it is important to invite attention to the point, very material in any discussion of the subject-matter, namely,

[1] Udny *v.* Udny, 1 H. L. Sc. p. 441; Moorhouse *v.* Lord, 10 H. L. Cas. 272; Shaw *v.* Gould, L. R. 3 H. L. 55, App. 457; Lawrence's Wheaton, Int. Law, p. 631. Cf. Lawrence's Wheaton, Int. Law, pp. 630, 631.

that the status of inhabitants of acquired territory, while relatively within contemplation of the stipulations usually found in treaties of peace, is not only not determined conclusively therein, but is often postponed to await in this regard the future disposition of the new sovereign. This much appears from diplomatic history, from the texts of treaties, from legislative acts, and by decisions of the judicial department of the government of the United States. A moment's reflection must satisfy the careful reader that this must be so; any action upon a contrary principle would deprive the dominant government of an essential attribute of sovereignty and might lead to disastrous consequences.

It has been said that the acquisition of new territory by war or treaty is political; and its ascertainment as a fact is determined and concluded by the treaty power whenever it acts constitutionally, leaving nothing in this regard to the decision of the judicial department. Or, to employ customary language, the ascertainment of such a fact by the political department will be followed by the judicial department. As a necessary consequence of the transfer of territory without qualifying stipulations, dominion of territory and government of inhabitants is surrendered by the old to the new sovereign. The dominion over the territory — meaning public lands and state property — is absolute; dominion over the inhabitants, while transferred as a necessary consequence, is usually qualified by provisions for the exercise of the right of election in favor of the original sovereign by the inhabitants, provided it be exercised and publicly recorded within a period of time indicated. Whatever covenants the new sovereign enters into in this particular must be carried out in good faith, otherwise a violation of the treaty obligation is incurred. It is usually only as to these qualifying clauses in respect to the transfer or retention of allegiance of the inhabitants of acquired territory that a treaty of peace is conclusive. A treaty may of course contain specific guaranties for "the protection of life, liberty, property," and for "the enjoyment of the inhabitants of rights, privileges, and immunities," as have in fact many treaties for the acquisition of territory to which the United States has been a party. The inhabitants not comprehended by such qualifying stipulations come under the protection and allegiance of the new sovereign, whose obligations are regulated by public law, usage, and the laws of the dominant sovereign. Whether the exercise of a particular power in a particular way, under a given state of facts, is lawful and constitu-

tional and in accordance with the institutions of a free government may only be determined by the appropriate department of government charged with the decision of such questions. What is the appropriate department for the decision depends upon the constitution of the government and the character of the question. In the United States, if the question is essentially "political," the action of the political department is conclusive, and will be adhered to or followed by the judicial department. If, however, the question to be ascertained is "judicial" in the sense in which this term is used in American jurisprudence, the judicial department will take jurisdiction and decide it.

Between the ratification of a treaty of peace and the action of the legislative department in execution of the provisions of the treaty, territory and inhabitants are in a transition state. Until action is had by Congress, both are under the protection of the treaty and subject to the government of the Executive. And the extent of Executive power is different, according as the situation in such territory is war or peace. A former President of the United States once said in the House of Representatives: —

"There are, then, in the authority of Congress and of the Executive, two classes of powers, altogether different in their nature, and often incompatible with each other, — the war power and the peace power. The peace power is limited by regulations and restricted by provisions prescribed within the Constitution itself. The war power is limited only by the laws and usages of nations. This power is tremendous; it is strictly constitutional, but it breaks down every barrier so anxiously erected for the protection of liberty, of property, and of life." [1]

In the Senate, during the discussion of the Ten Regiment Bill, Mr. Webster, however, expressed his "repugnance to all this doctrine and all this practice." Events which have transpired in American history since an early period indicate that there has been an extension of the Executive power not perhaps originally contemplated, which is usually justified upon the ground that it is the necessary exercise by the Executive of the war power. The situation in the Philippines since the first hostile gun was fired in Luzon, though not war in the technical sense, presents a striking illustration of the exercise of the Executive power as commander-in-chief of the army and navy; and recent hostilities in China are another instance of the exercise of the same power. The war

[1] Speech delivered by Mr. John Quincy Adams in the House of Representatives, 26th May, 1836.

power of the Executive, though from time to time assailed, criticised, and questioned, more usually in partisan or political discussions, has, for a long period of years, as occasion arose, been exercised to its full extent. Against the unwarranted exercise of this power the Constitution provides three checks: first, the authority of Congress to control supplies of men and money; second, the authority of Congress to impeach; third, the power of the Judiciary to refuse to give the sanction of law to whatever the Executive may do in excess of his power, and by holding the agents and instruments of his unlawful action to strict accountability. There exists a fourth check upon Executive aggression more potent and effective than constitutional restraints, and this is the power of public opinion when opportunely and unmistakably expressed. Whether or not the occasion justifies the use by the Executive of the war power must depend upon circumstances to be determined primarily by the Executive, who exercises a large measure of discretion in this regard.

The treaty of peace between the United States and Spain contained the following stipulations: —

"Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of the proceeds; and they shall also have the right to carry on their industry, commerce, and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the crown of Spain by making, before a court of record, within a year from the date of exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they reside.

"The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress. Article IX."

The first observation to be made in view of the first paragraph is, that it confines the privilege or right of election of original nationality to "Spanish subjects, natives of the Peninsula." Other "inhabitants of the territories" would therefore seem by omission to be excluded from exercising this privilege or right of election of original nationality when remaining within the territory ceded.

And this view is confirmed by the express language of the second clause, which relegates to the Congress the determination of the "civil rights" and "political status" of the "native inhabitants." And this brings us to the inquiry, What was intended and included in the terms "civil rights" and "political status;" and what, if any, effect do they have in respect to the actual nationality of the native inhabitants? It is contended on one side that as the native inhabitants have been, by the terms of the treaty, deprived of their original character, which was Spanish, and denied the privilege or right of election of original national character, their actual national character is that of Americans, entitled to all the rights, privileges, and immunities of citizens of the United States. On the other hand, it is contended that by the express terms of the treaty under which the territories were ceded their national character remains to be determined by the Congress, and until Congress acts in respect thereof they are inhabitants or citizens of the respective territories and *not* citizens of the United States. The competency of the treaty-making power of the United States to make a provision excluding the native inhabitants from the enjoyment of American national character until Congress acts has, it appears, been questioned in a civil suit which will be hereafter noticed. The collocation of the apt phrases "civil rights" and "political status" seems to have been inserted *ex abundanti cautela*, and to have been in the nature of a declaration of policy on the part of the treaty power of the United States. The clause in which they are used differs radically from corresponding clauses in other treaties to which the United States has been a party, and no precedent has been found for their use in this relation. This may, however, be readily accounted for, because the situation which confronted the peace commissioners was unique and novel, and they no doubt felt impelled to be as definite and explicit as the nature of things admitted. The phrase "civil rights" presumably includes or describes all those fundamental rights which a free people are understood to enjoy under all constitutional governments, the vindication of which has been consistently upheld by the courts of the United States. These fundamental rights of a free people must have been protected by the government of the United States, even though the treaty had been silent on the subject.[1] "Civil rights," however, is a broader phrase than "fundamental rights," and includes other rights which are in their nature political, and

[1] Murphy *v.* Ramsey, 114 U. S. 15-47, citing cases; Church of Jesus Christ *v.* United States, 136 U. S. 1, 44.

that are not usually comprehended in the description of "fundamental rights." In American law, "Civil Rights" is a term applied to certain rights secured to citizens of the United States by the Thirteenth and Fourteenth Amendments to the Constitution, and by various acts of Congress made in pursuance thereof. These amendments were designed to secure rights of a civil and political nature only, but not social or domestic rights. The determination of the "political status" is altogether a different matter. It means the legislative ascertainment of the future national character (citizenship) of these inhabitants. There are two kinds of citizenship under our political system of government, — federal and state; and suffrage is an attribute of the latter, exercisable in each state under the conditions and qualifications imposed by its constitution. It has been said that persons brought in by annexation of foreign territory are not regarded by the political or judicial department of the United States as aliens, but citizens; but this has been held to apply to persons resident in territory admitted as states of the Union, and in cases where there have been no qualifying clauses in the treaty.[1]

National character (citizenship) implies a political tie or relationship existing between individuals and an independent state; it results ordinarily (a) from birth within the territory and jurisdiction of a particular state; or may be acquired as the result (b) of individual naturalization, or (c) of collective naturalization. In the first instance, the individual becomes a citizen, with or without the consent of the state; in the second instance, he may only become a citizen as the result of compliance with the laws or regulations of the state in respect thereto, clearly and definitely expressed. The individual cannot, in the second instance, ever become a citizen of a state against the will and protest of the state; and he may not enjoy the electoral franchise without express authority of the state.

It was pertinently said in an admirable and exhaustive address by Judge McAtee of the Supreme Court of Oklahoma, before the Bar Association of Oklahoma: —

"And while to us here residing in a territory belonging to the United States the blessings of liberty, including the constitutional, personal, and civil guaranties of liberty, have been so fully distributed that we have

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1 Story, The Constitution, ii. p. 654 (4th ed.), note by Cooley; Paschall, Annotd. Constitution U. S., pp. 222–225; Boyd *v.* Nebraska, *ex rel.* Thayer, 143 U. S. pp. 135–186.

failed to observe the fact, while we claim citizenship in the United States, that we are not, in fact, citizens of that United States which is created by the Constitution; that we do not participate in the election of a President, of senators, or of representatives in Congress, and that since the Constitution itself provides only for the election of a President, of senators, and representatives, and for the creation of a 'judicial power of the United States,' that yet while the Congress has conceded to us as territory the privilege of electing a delegate who shall sit upon the floor of Congress and advise and serve concerning the interests of the territory from which he is sent, that yet, under the provisions of the Constitution, Congress itself has no power to give that delegate a seat."

Since the first part of this article was concluded, the attention of the writer has been invited to an interesting and exhaustive decision rendered some time in June of this year, in the United States Circuit Court for the Southern District of New York, in the case of Goetze & Co. against the United States. To the contention of counsel that it was not competent for the treaty-making power to insert provisions that may infringe rights protected by constitutional principles, the court (Townsend, J.) says: —

"The only remaining ground upon which it can be urged that Porto Rico status has been changed is that the treaty is unconstitutional. Thus far in the history of our country no treaty has ever been adjudged invalid on this ground. A treaty is not only the law of our land, but also a contract of the United States with another nation. A court would not be justified in overruling the act of the treaty-making power unless its reasons for so doing were strong and imperative."

The court concludes: "The treaty of Paris left the political status of the inhabitants of Porto Rico unchanged;" that is, in respect to the matter under consideration.

"Their status at the time of the cession was, as declared by the Supreme Court, that of inhabitants of a foreign country as regards the Constitution of the United States and within the meaning of the tariff acts. The treaty of cession did not change that status. And as Congress had not acted at the time of this importation, Porto Rico was still a foreign country in the sense of the tariff law, and duties were lawfully assessed on the articles imported therefrom."[1]

The Goetze case is on appeal before the Supreme Court of the United States, and has been assigned for hearing on Monday, December 17.

In a proceeding on a writ of habeas corpus issued on petition

[1] Goetze *v.* U. S., 103 Federal Reporter, 72 *et seq.*

of Rafael Ortiz, Judge Lockren (U. S. Dist. Court for Minnesota), on May 5, 1900, held that "upon the cession by Spain to the United States of the island of Porto Rico, that island became a part of the domain of the United States, and the Constitution, *ex proprio vigore*, at once extended over it, and became the supreme law of the land, including the provision giving the right of jury trial in criminal prosecutions." [1]

Section VII. of the Act of Congress (April 12, 1900) entitled "An Act temporarily to provide revenues and a civil government for Porto Rico," etc., must be accepted as legislative recognition of the regularity and propriety of the qualifying clauses in Article IX. of the treaty of Paris in respect to the "political status" of the native inhabitants of the ceded territories. While it may be objected that the terms "citizens of Porto Rico" may not be, in a narrow technical sense, accurate, because there can be no such relation between individuals and a subject political community, yet they are purposely used in the act of Congress as *designatio personarum*, and as sufficient for the purposes of the legislation in hand.

These resident inhabitants of Porto Rico are citizens in relation to the local civil government, as the resident inhabitants of Oklahoma and the Indian Territory are citizens of Oklahoma and the Indian Territory.

In a case involving the construction of another branch of the concluding paragraph of Art. IX. of the treaty it was recently said: —

> "The United States had the sovereign and undisputed right to provide in the treaty with Spain that all citizens of Porto Rico should at once become citizens of the United States, but it was not done. . . . The whole subject of collective naturalization was thus, by the express terms of the treaty relegated to the Congress of the United States. . . . The right claimed by the relator depends upon express proof that the rights of full citizenship were conferred; and it cannot be upheld solely upon the broad claim that the Constitution follows the flag, or the claim that in the United States there can be no subjects. If it were a case in which the relator was sought to be deprived of life, liberty, or property without due process of law, as required by the fundamental law of the United States, a different question would be presented." [2]

In the suit of Bigley and others against New York and Porto

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[1] *Ex parte* Ortiz, 100 Federal Reporter, 955.

[2] Freedman, J., In matter of Frank Juarbe, Superior Court of New York.

Rico Steamship Co., Judge Brown of the United States District Court for the Southern District of New York is reported to have held "that Porto Rico, since the cession of the island by Spain to the United States, is not a foreign port, as it is subject solely to the sovereignty and dominion of this country."

"In the dependence of the territories upon the central government," says Cooley,[1] "there is some outward resemblance to the condition of the American colonies under the British Crown; but there are some differences which are important and indeed vital. The first of these is that the territorial condition is understood to be merely temporary and preparatory, and the people of the territories are assured of the right to create and establish state institutions for themselves so soon as the population shall be sufficient and the local conditions suitable; while the British colonial system contained no promise or assurance of any but a dependent government indefinitely. The second is that above given, that the people of the American territories are guaranteed all the benefits of the principles of constitutional right which protect life, liberty, and property, and may defend the same under the law, even as against the action of the government itself." Further discussing the relations of territories to the central government, the same author[2] says: "Rules and regulations for the territory of the United States may be of two kinds: First, those having regard to it as property merely, and intended to guard and improve it as such, and perhaps to prepare it for sale and sell it; and second, those which concern the government of the people who may reside within the territory before it is formed into states."[3]

From these necessarily brief considerations, the following conclusions seem to follow: —

First. That upon a change of sovereigns the ceded territory and its inhabitants remain under the municipal law, public and private, of the former sovereign, as the same subsisted at the time of the cession, until such time as the new sovereign, through the appropriate department of government, alters or modifies the same;

Second. The relations of the inhabitants of such territory, not excluded or excepted in treaty stipulations, are dissolved, and new

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[1] Principles of Constitutional Law, p. 37.
[2] Ib. p. 182.
[3] U. S. *v.* Gratiot, 14 Pet. 526.

relations are created between them and the government which has acquired their territory; and that the law, which may be denominated *political*, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the new sovereign;

Third. That the relation of the inhabitants to the new sovereign is that of subject or citizen, according to the stipulations of cession and the form of the incorporating state;

Fourth. That under the American political system of government, the power of Congress over ceded territory and its inhabitants is discretionary and supreme; and that legislation in respect to both is subject to no other control than the stipulations of the treaty and the Constitution;

Fifth. That connected with these general rights and powers of Congress, there are obligations and duties which are to be ascertained from the law of nations, the stipulations of cession, and the principles of the Constitution of the United States, and the decisions of the courts;

Sixth. That under the American political system of government the securities to life, liberty, and property which are incorporated in the Constitution were intended as limitations of its power over any and all persons who might be within its jurisdiction anywhere; and that citizens of the territories, as well as citizens of the states, may claim the benefit of their protection.

Seventh. That as a result of the ratification of the treaty of Paris of December 10, 1898, the dominion of Spain over the territories ceded and their native inhabitants was transferred to the United States; that the United States succeeded to the sovereignty of Spain, and that the allegiance of the unexcepted native inhabitants was transferred to the United States: in other words, the political tie which had formerly bound these inhabitants to Spain was transferred to the United States, and as a consequence, the obligation of the new sovereign to protect and the duty of the inhabitants to render allegiance became reciprocal.

Eighth. That according to the modern law of nations, the native inhabitants of the Philippine Archipelago, and of Porto Rico, must be deemed to be citizens or subjects of the United States.

Ninth. That under the national (municipal) law of the United States, the native inhabitants of the Philippine Archipelago and Porto Rico must be deemed to be citizens or subjects of the United States, until and as Congress shall determine their civil

and political status, or the Supreme Court in a proper case may decide.[1]

Alexander Porter Morse.

WASHINGTON, November 15, 1900.

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[1] The eighth and ninth conclusions were submitted to Mr. Crammond Kennedy, of Washington, D. C., who is well versed in international law, and is familiar with current history, and he made the following comment: "I agree with No. 8 with the following qualifications: (a.) Such rights of independence and self-government as the Sultan and people of Jolo had under the agreement with Spain when the treaty of Paris became effective. (See Mr. Schurman on this point.) (b.) The right of the native inhabitants, under the modern law of nations, to be consulted as to a change of their allegiance. (See Halleck, ch. vi. sec. 9.) Modern instances: San Domingo when annexation was proposed in Grant's administration; Saint Thomas when negotiations for selling the island to the United States were opened with the King of Denmark. (c.) The rights which the Filipinos had acquired by conquest. They had abjured their allegiance to Spain and had repossessed themselves of Luzon, outside of Manila, and established a government of their own before the treaty of Paris was concluded; and they might properly have been recognized as free and independent by the United States government. They had over 7000 forts on the coast as well as in the interior, including the city and port of Iloilo, which they took and governed in a civilized manner, almost heavenly compared with the conduct of the so-called Christian powers at Tientsin and elsewhere in China. From this point of view our government is waging a war of subjugation in Luzon, and the inhabitants of the districts they control are neither citizens nor subjects of the United States.

"I agree with No. 9 with the qualification that Congress in legislating for the inhabitants of any part of the territory or domain of the United States is bound by the Constitution, anything in the treaty of Paris, expressed or implied, to the contrary, notwithstanding."